A

Ng Kong Ling & Anor v Low Peck Lim & Ors

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-42–07 OF 2016(B)
RAUS SHARIF PCA, SURIYADI, AHMAD MAAROP, ZAINUN ALI AND RAMLI ALI FCJJ
17 APRIL 2017

C

Civil Procedure — Jurisdiction — Sessions court — Sessions court hearing debt claim heard evidence and rejected defendant's contention that trust of shares existed in his favour — Whether s 66(1) of the Subordinate Courts Act 1948 ('the SCA') gave sessions court competence and duty to determine trust issue 'to dispose of whole D *matter in controversy' even where matter raised in defence or counterclaim was beyond court's jurisdiction — Whether s 66(1) exception to s 69(e) of the SCA which declared sessions court had no jurisdiction to enforce trusts — Whether sessions court's determination on trust issue precluded defendant from raising same issue again in subsequent proceedings — Res judicata*

E

In an action filed by the first and second respondents against the appellants in the High Court, the first respondent ('R1') had claimed that the appellants held certain shares in the respondent companies on trust for him ('the trust issue'). During the pendency of that suit, the third respondent ('R3') sued R1 F in the sessions court to recover a debt. R1 raised the trust issue as his main defence to that action contending that the dividends due to him from the trust shares were sufficient to satisfy R3's claim. After a full trial, the sessions court granted judgment to R3 and rejected R1's defence after finding that there were no shares held on trust for him. The sessions court's decision was affirmed on G appeal by the High Court. Following that decision, the appellants applied in the High Court action to strike out certain paragraphs concerning the trust issue in the first and second respondents' re-amended statement of claim on the ground the trust issue had already been determined in the sessions court action. The first and second respondents argued that res judicata and issue estoppel H could not apply because the sessions court had no jurisdiction to enforce trusts under s 69(e) of the Subordinate Courts Act 1948 ('the SCA'). In response, the appellants argued that pursuant to s 66(1) of the SCA, where any defence or counterclaim raised by the defendant in the sessions court involved matters beyond the court's jurisdiction, that would not affect the court's competence or I duty 'to dispose of the whole matter in controversy' between the parties. The High Court dismissed the appellants' striking out application, which decision was affirmed by the Court of Appeal ('the COA'). The Federal Court granted the appellants leave to appeal against the COA's decision on the question: (a) whether the SCA precluded the sessions court from adjudicating on any

matter relating to a trust; (b) whether s 66 of the SCA was an exception to s 69 thereof to enable the sessions court to dispose of the whole matter in controversy to prevent truncated trials or staying of proceedings in the sessions court for referral of the matter to the High Court; and (c) whether a finding by the sessions court on whether or not there was a trust estopped the party affected by the decision from raising the same issue again in subsequent proceedings.

Held, allowing the appeal and striking out those paragraphs in the first respondent's re-amended statement of claim that raised the trust issue:

(1) Section 69(e) of the SCA did not apply in this case because the sessions court action was not brought to enforce a trust. The trust issue was raised as a defence by the first respondent ('R1') to claim a set off against the debt owing by him to the third respondent. R1 required the sessions court to make a finding that the shares were held on trust for him so that the dividends from the shares could be set off against the debt claimed. It was a defence to determine the existence of a trust to claim the set off. Enforcing a trust and determining the existence of a trust were two different matters (see para 30).

(2) Section 66 was an exception to the limitations contained in s 69 of the SCA. The objective of s 66(1) was to prevent defendants from delaying the action. The legislative purpose behind s 66(1) was to give the sessions court 'the competence and duty' to dispose of the whole matter in controversy between the parties even where the matter raised by way of defence or counterclaim by the defendant was beyond the jurisdiction of the court (see paras 31 & 34).

(3) The findings by the sessions court on the trust issue were not a mere observation, remark or obiter dicta but was an issue that was decided upon by the sessions court and affirmed on appeal by the High Court. The rejection of the first respondent's defence on the trust issue was a part of the ratio decidendi of the case. The first respondent was, therefore, estopped from litigating the issue again in the High Court proceedings on the principle of res judicata. Although the appellants were not directly parties in the sessions court action, the first respondent was a party to both the sessions court and the High Court actions and it was he who had raised the trust issue as a defence (see paras 41–42 & 44).

[Bahasa Malaysia summary

Dalam tindakan yang difailkan oleh responden-responden pertama dan kedua terhadap perayu-perayu di Mahkamah Tinggi, responden pertama ('R1') telah mendakwa bahawa perayu-perayu memegang syer-syer tertentu dalam syarikat responden atas amanah untuknya ('isu amanah'). Sepanjang guaman tersebut, responden ketiga ('R3') telah menyaman R1 di mahkamah sesyen untuk

A mendapat balik hutang. R1 telah menimbulkan isu amanah itu sebagai pembelaan utamanya terhadap tindakan tersebut dengan berhujah bahawa dividen yang perlu dibayar kepadanya daripada syer-syer amanah itu adalah mencukupi untuk memenuhi tuntutan R3. Selepas perbicaraan penuh, mahkamah sesyen telah menyampaikan penghakiman kepada R3 dan menolak
B pembelaan R1 selepas mendapati bahawa tidak terdapat syer yang dipegang atas amanah untuknya. Keputusan mahkamah sesyen itu telah disahkan atas rayuan oleh Mahkamah Tinggi. Berikutan keputusan tersebut, perayu-perayu telah memohon dalam tindakan Mahkamah Tinggi itu untuk membatalkan
C perenggan-perenggan tertentu berkaitan isu amanah itu dalam penyataan tuntutan responden-responden pertama dan kedua yang dipinda semula atas alasan isu amanah itu telahpun ditentukan dalam tindakan mahkamah sesyen. Responden-responden pertama dan kedua berhujah bahawa res judicata dan isu estopel tidak boleh terpakai kerana mahkamah sesyen tidak mempunyai
D bidang kuasa untuk menguatkuasakan amanah-amanah di bawah s 69(e) Akta Mahkamah-Mahkamah Rendah 1948 ('AMR'). Sebagai jawapan, perayu-perayu berhujah bahawa menurut s 66(1) AMR, di mana apa-apa pembelaan atau tuntutan balas yang ditimbulkan oleh defendan dalam mahkamah sesyen melibatkan perkara-perkara melampaui bidang kuasa
E mahkamah, itu tidak akan menjejaskan kecekapan mahkamah atau kewajipan 'to dispose of the whole matter in controversy' antara pihak-pihak. Mahkamah Tinggi telah menolak permohonan pembatalan perayu-perayu, yang mana keputusan itu telah disahkan oleh Mahkamah Rayuan ('MR'). Mahkamah Persekutuan memberikan kebenaran kepada perayu-perayu untuk merayu
F terhadap keputusan MR atas persoalan: (a) sama ada AMR mengecualikan mahkamah sesyen daripada mengadili apa-apa perkara berkaitan dengan amanah; (b) sama ada s 66 AMR adalah pengecualian kepada s 69 bagi membolehkan mahkamah sesyen menyelesaikan keseluruhan perkara yang menjadi kontroversi itu bagi mengelakkan perbicaraan-perbicaraan
G ditangguhkan atau prosiding digantung di mahkamah sesyen untuk rujukan berhubung perkara itu kepada Mahkamah Tinggi; dan (c) sama ada penemuan oleh mahkamah sesyen berhubung sama ada atau tidak terdapat amanah yang diestop yang terjejas oleh keputusan itu daripada menimbulkan isu yang sama lagi dalam prosiding selanjutnya.

H

Diputuskan, membenarkan rayuan dan membatalkan perenggan-peranggan tersebut dalam penyataan tuntutan responden pertama yang dipinda semula yang telah menimbulkan isu amanah:

I (1) Seksyen 69(e) AMR tidak terpakai dalam kes ini kerana tindakan mahkamah sesyen tdak dimulakan untuk menguatkuasakan suatu amanah. Isu amanah ditimbulkan sebagai pembelaan oleh responden pertama ('R1') untuk menuntut penepian terhadap hutang yang terhutang olehnya kepada responden ketiga. R1 menghendaki mahkamah sesyen membuat penemuan bahawa syer-syer telah dipegang

atas amanah untuknya agar dividen-dividen daripada syer-syer itu boleh diketepikan daripada hutang yang dituntut. Ia adalah pembelaan untuk menentukan kewujudan suatu amanah untuk menuntut penepian itu. Menguatkuasakan amanah dan menentukan kewujudan amanah adalah dua perkara berbeza (lihat perenggan 30).

(2) Seksyen 66 adalah pengecualian kepada had yang terkandung dalam s 69 AMR. Objektif s 66(1) adalah untuk menghalang defendan-defendan daripada melengahkan tindakan. Tujuan perundangan s 66(1) adalah untuk memberi mahkamah sesyen 'the competence and duty' untuk menyelesaikan keseluruhan perkara yang menjadi kontroversi antara pihak-pihak walaupun ditimbulkan melalui pembelaan atau tuntutan balas oleh defendan adalah melampaui bidang kuasa mahkamah (lihat perenggan 31 & 34).

(3) Penemuan oleh mahkamah sesyen berhubung isu amanah bukan hanya satu pemerhatian, penyataan atau obiter dicta semata-mata tetapi adalah satu isu yang telah diputuskan oleh mahkamah sesyen dan disahkan atas rayuan oleh Mahkamah Tinggi. Penolakan pembelaan responden pertama berhubung isu amanah itu adalah sebahagian daripada ratio decidendi kes tersebut. Responden pertama adalah, oleh itu, diestopkan daripada melitigasikan isu itu lagi dalam prosiding Mahkamah Tinggi berhubung prinsip res judicata. Walaupun perayu-perayu bukan secara langsung pihak-pihak dalam tindakan mahkamah sesyen, responden pertama ialah pihak kepada kedua-dua tindakan mahkamah sesyen dan Mahkamah Tinggi dan ia adalah dia yang telah menimbulkan isu amanah sebagai pembelaan (lihat perenggan 41–42 & 44).]

Notes

For cases on sessions court, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6349–6357.

Cases referred to

Ahmad Salaji v Hashim Salaji [1915] 42 1A 91, PC (refd)
Asia Commercial Finance (M) Sdn Bhd v Kawai Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2) [1966] 2 All ER 536, HL (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)
Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122, CA (refd)
Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 QB 630, CA (refd)
Koh Siew Keng (P) & Anor v Koh Heng Jin [2008] 3 MLJ 822, CA (refd)
Nana Ofori Atta II, Omanhene of Akyem Abuakwa v Nana Abu Bonsra II as Adansehene and as Representing Stool of Adanse [1958] AC 95, PC (refd)

North West Water Ltd v Binnia & Partners (a firm) [1990] 3 All ER 547, QBD (folld)
Thien Kon Thai, Re [2008] 6 MLJ 278, CA (refd)
Wong Kon Sang v Chang Litho Press Ltd [1968] 2 MLJ 234 (refd)
Wong Peng Yan Benjamin v Genting Bhd & Anor [1993] 3 MLJ 713, HC (refd)

Legislation referred to

Court Ordinance 1948 s 66(1)
Rules of Court 2012 O 18 r 19, 19(1)(b), (1)(d)
Subordinate Courts Act 1948 ss 66, 69, 69(e)

Cyrus Das (HY Chong and Lim Shan Yi with him) (Azman Davidson & Co) for the appellants.
Tommy Thomas (DM Rao with him) (DM Rao & Co) for the first and second respondents.
Karin Lim (Syamshul bin Jamil with her) (Presgrave & Mathews) for the third to eighth respondents.

Raus Sharif PCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision by the Court of Appeal that affirmed the decision of the High Court.

[2] The High Court had earlier dismissed the appellants' application for an order to strike out certain paras of the first and second respondents' re-amended statement of claim under O 18 r 19 of the Rules of Court 2012.

[3] The central issue in this appeal is whether the sessions court is precluded altogether under the Subordinate Courts Act 1948 (Revised 2013) from deciding any question relating to a trust?

[4] Learned counsel for the appellants contended that the trust issue which appeared in the first and second respondents' re-amended statement of claim, had earlier been decided by the sessions court, and thus the first and second respondents were estopped from raising the same issue again. It was contended that retrying of the trust issue in the action would be an abuse of the court process by reason of estoppel and the principle of res judicata. As such, it came within the purview of O 18 r 19(1)(b) and (d) of the Rules of Court 2012.

[5] The first and second respondents contended that estoppel and res judicata did not apply in this case as by virtue of s 69(e) of the Subordinate Courts Act 1948 the sessions court had no jurisdiction to enforce a trust. In

reply the appellants relied on s 66 of the same Act which states that where the matter was said to be beyond the jurisdiction of the court but was raised by way of a defence to a counterclaim by a defendant, the sessions court will have the competence or duty to dispose of 'the whole matter in controversy' between the parties.

[6] Thus, the question of compatibility of the two sections and whether one section takes precedence over the other arises. In the result, this court had allowed the following questions of law for determination of this appeal:

> Question 1
>
> Whether a sessions court is precluded under the Subordinate Courts Act 1948 from adjudicating on any matter relating to a trust?
>
> Question 2
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> Whether s 66 of the Subordinate Courts Act 1948 should be read as an exception to s 69 of the Subordinate Courts 1948 to enable disposal of the whole matter in controversy and to prevent truncated trials or the staying of proceedings in the sessions court for referral of the matter to the High Court?
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> Question 3
>
> Whether the determination of the existence of a trust or otherwise by the sessions court as affirmed by the High Court can give rise to issue estoppel in subsequent legal proceedings where the same issue is raised?

BACKGROUND FACTS

[7] The appellants are the first and second defendants in Suit MT4–22–204 of 2003 brought by the first and second respondents in the Shah Alam High Court ('Shah Alam High Court action'). The third to the eighth respondents are the third and eighth defendants respectively in the same action.

[8] There are five different causes of action in the Shah Alam High Court action, brought by the first and second respondent as plaintiffs in various capacities. One of them is the claim by the first respondent that the appellants held some 13% of the shares in each of the third to eighth respondent companies in trust for him ('the trust issue').

[9] While the Shah Alam High Court action was still pending, the third respondent's company sued the first respondent in the sessions court at Shah Alam ('the sessions court action') to recover monies owed to it as a debt. In the sessions court action, the third respondent's company was the plaintiff and the first respondent the defendant.

[10] In the sessions court action, the first respondent raised as his defence to the claim for the debt that the present appellants held 13% of the shares in each of the third and eighth respondents companies in trust for him. The first respondent therefore claimed that the dividends due to him from those shares would satisfy the debt.

[11] At the trial in the sessions court action, both the first appellant and the first respondent gave evidence. The trust issue was relied upon by the first respondent as his main defence against the third respondent's company claim. The first respondent called one Dato' Khoo Peng Lai, the company auditor of the third respondent company, to testify in support of the trust over the shares. He also called one Jessica Yeong Pew Wan, a legal secretary with the law firm of Messrs Abraham Ooi & Partners to testify on his behalf in relation to the alleged trust.

[12] Upon conclusion of the full trial, the sessions court found against the first respondent. The sessions court found that the said shares were not held in trust for the first respondent and on that basis there was no defence to the claim. It accordingly granted judgment for the sum of RM164,329.60 in favour of the third respondent company.

[13] The first respondent, appealed to the Shah Alam High Court against the decision of the sessions court. On 21 January 2013, the appeal was dismissed and the decision of the sessions court was affirmed by the High Court.

[14] The first respondent did not pursue further any appeal against the decision of the High Court. Thereafter, the appellants took out an application in the present Shah Alam High Court action, to strike out the relevant part of the first respondent's statement of claim dealing with the trust issue on the grounds of res judicata and/or estoppel.

[15] The first respondent's claim on the trust issue in the Shah Alam High Court action are found in para 4(a)–6(b), 35D(a), 35D(b) and 35D(c) of the re-amended statement of claim. It reads as follows:

> 4(a)(i) Pada atau kira-kira pada pertengahan tahun 2000 Plaintif Pertama mempunyai cadangan untuk membuka sebuah pejabat guaman beliau di Shanghai atau Beijing di negeri China. Jika cadangan tersebut berhasil atau dilaksanakan, Plaintif Pertama mungkin meluangkan lebih masa di luar negeri, tambahan pula, pada masa tersebut Plaintif Pertama juga sering melawat Australia untuk menghadiri urusan-urusan yang tertentu;
>
> (ii) Maka, pada bulan Ogos 2000 Plaintif Pertama telah bertemu dengan Defendan Pertama beserta Encik Peter Khoo Peng Lai, pengaudit akaun syarikat dan juga sepupu kepada Defendan Pertama dan sepupu jauh Plaintif Pertama di mana,

Plaintif Pertama telah memberitahu mereka bahawa Plaintif Pertama . berniat memindah milik 25% saham beliau kepada isterinya dan juga kepada Defendan Pertama untuk dipegang oleh Defendan Pertama atas amanah;

(iii) Pada kira-kira pada 23.08.2000, Plaintiff Pertama telah memberi 3 salinan notis kepada setiausaha syarikat melalui Encik Peter Khoo Peng Lai, pengaudit syarikat Defendan supaya memindah milik 12% saham-saharnnya di dalam tiap-tiap syarikat-syarikat Defendan tersebut kepada isterinya, PlaintifKedua di sini. Akibatnya, Plaintif Kedua kini atau mulai daripada 2.4.2001 memegang 12% saham-saham dalam Defendan Ketiga hingga Kelapan. Mengikut rekod setiausaha syarikat, 12% saham tersebut telah berpindah milik kepada Plaintif Kedua pada atau kira-kira pada 02.04.2001 seperti berikut:-

(i) Defendan Ketiga, Trend Intan:
– 198,589 saham atau 12% ekuiti kesemua saham yang diisukan

(ii) Defendan Keempat, Amity Accord:
– 4,800 saham atau 12% ekuiti kesemua saham yang diisukan

(iii) Defendan Kelima, Intan Cendekia:
– 4,800 saham atau 12% ekuiti kesemua saham yang diisukan

(iv) Defendan Keenam, Vibrant Portfolio:
– 4800 saham atau 12% ekuiti kesemua saham yang diisukan

(v) Defendan Ketujuh, Ardeny Realty:
– 4,800 saham atau 12% ekuiti kesemua saham yang diisukan

(vi) Defendan Kelapan, Ying Yong Property:
– 60,000 saham atau 12% ekuiti kesemua saham yang diisukan

(b)(i) Menurut notis-notis arahan yang bertarikh 23.08.2000 tersebut, Plaintif Pertama juga memberi arahan supaya baki 13% saham Plaintif Pertama tersebut di pindah milik kepada Defendan Pertama dan Defendan Kedua atas amanah bagi Plaintif Pertama. Maka, baki 13% saham-saham kepunyaan Plaintiff Pertama dalam syarikat Defendan Ketiga hingga Kelapan juga dipindahmilik kepada Defendan Pertama dan Kedua dan kini atau mulai daripada 2.4.2001 adalah dipegang di bawah amanah oleh Defendan Pertama dan isterinya, iaitu Defendan Kedua, atas amanah dan untuk faedah/manfaat untuk Plaintif Pertama.

(b)(ii) Plaintif Pertama mengulangi bahawa melalui tiga (3) salinan surat atau notis yang bertraikh 23.08.2000 yang tersebut di atas yang kemudian ditandatangani atau diindorskan oleh Plaintif Pertama dan dihantar kepada setiausaha syarikat melalui Encik Peter Khoo Peng Lai, pengaudit syarikat-syarikat Defendan, Plaintif Pertama telah memberi arahan kepada setiausaha syarikat supaya memindah milik baki 13% saham-saham Plainitf Pertama tersebut ke atas nama Defendan Pertama dan Kedua yang berkenaan masing-masing.

(c)(i) Melalui 3 akujanji bertulis yang diindorskan atau ditandatangani yang diindorskan atau ditandatangani oleh Defendan Pertama dan Kedua di bawah tanda 'bcc' di dalam salinan-salinan surat atau notis arahan Plainitf Pertama yang bertarikh 23 August 2000 tersebut, Defendan Pertama dan Kedua telah bersetuju untuk menerima dan memegang 13% saham-saham Plaintif Pertama tersebut di

bawah Amanah untuk Plaintif Pertama. Defendan Pertama dan Kedua juga telah secara tiada batalan atau irrevocable bersetuju untuk memindah-balik ('re-transfer') 13% saham Plaintif Pertama tersebut kepada Plaintif Pertama atas notis oleh Plaintif Pertama kepada mereka. Maka, suatu 'half secret trust' telah diwujudkan bagi dan untuk Plaintif Pertama. Plaintif Pertama akan merujuk kepada surat-surat akujanji/persetujuan yang diindorskan oleh Defendan Pertama dan Kedua di dalam notis-notis yang bertarikh 23.08.2000 tersebut yang telah dilaksanakan oleh Defendan Pertama dan Kedua masing- masing semasa perbicaraan nanti.

(ii) Berdasarkan kepada notis-notis arahan bertarikh 23.08.2000 kepada setiausaha kepada setiausaha syarikat dan akujanji-akujanji yang dikemudian diberikan oleh Defendan Pertama dan Kedua yang juga merupakan suatu 'half secret trust' bagi Plaintif Pertama oleh Defendan Pertama dan Kedua, Plaintif Pertama telah bersetuju atau terus bersetuju untuk memindahmilik baki 13% saham beliau kepada Defendan pertama dan Kedua untuk dipegang atas amanah bagi faedah Plaintiff Pertama.

(iii) Maka Defendan Pertama dan kedua diestop atau dilarang daripada menafikan wujudnya 'half secret trust' tersebut dan juga akujanji untuk memulangkan saham-saham tersebut kepada Plaintif Pertama atas tuntutan. Menurut rekod-rekod setiausaha syarikat 13% saham tersebut telah dipindah milik kepada Defendan Pertama dan Kedua pada 2.4.2001, butir-butirya adalah sepeti berikut:-

(i) Defendan Ketiga, Trend Intan

– 215, 139 saham atau 13% ekuiti kesemua saham yang diisukan dipindah milik oleh Plaintif Pertama kepada Defendan Pertama;

(ii) Defendan Keempat, Amity Accord

– 5,200 saham atau 13% ekuiti kesemua saham yang diisukan dipindah milik oleh Plaintif Pertama kepada Defendan Kedua;

(iii) Defendan kelima, Intan Cendekia

– 5,200 saham atau 13% ekuiti kesemua saham yang diisukan dipindah milik oleh Plaintif Pertama kepada Defendan Kedua;

(iv) Defendan Keenam, Vibrant Portfolio

– 5,200 saham atau 13% ekuiti kesemua saham yang diisukan dipindah milik oleh Plaintif Pertama kepada Defendan Kedua;

(v) Defendan Ketujuh, Ardent Realty

– 5,200 saham atau 13% ekuiti kesemua saham yang diisukan dipindah milik oleh Plaintif Pertama kepada Defendan Kedua;

(vi) Defendant Kelapan, Ying Yong Property

– 65,000 saham atau 13% ekuiti kesemua saham yang diisukan dipindah milik oleh Plaintif Pertama kepada Defendan Pertama;

4(d) Plaintif Pertama mengatakan bahawa pindak milik 13% saham Plaintif Pertama yang tersebut di atas kepada Defendan Pertama dan kedua langsung tidak melibatkan sebarang balasan atau 'set off' dan Plaintif Pertama akan merujuk

kepada notis-notis bertarikh 23hb Ogos 2000 di mana wujudnya suatu 'half secret trust' dan akujanji tersebut yang diindorskan oleh Defendan Pertama dan kedua semasa perbicaraan penuh nanti.

4(e) Plaintif Pertama mengatakan bahawa selepas 02.04.2001 dan sehingga 20.12.2002, tiada perubahan iaitu kenaikan atau penambahan saham-saham di dalam syarikat-syarikat Defendan, dan sebarang perubahan .berkenaan dengan penambahan saham dan pertukaran pemegang saham adalah tidak sah.

4(f) 13% saham Plaintif Pertama yang telah dipindah milik kepada Defendan Pertama dan Kedua atas amanah bagi Plaintif Pertama seperti temyata di atas adalah dirujuk sebagai 'saham amanah tersebut'.

Notis-notis oleh Plaintif Pertama dan peguamnya kepada Defendan Pertama dan Kedua untuk memulangkan saham amanah tersebut.

5(a)(i) Berikutan dengan Plaintif Pertama mengetahui pengeluaran cek Defendan Ketiga oleh Defendan Pertama secara frod pada Ogos 2002 dan berikutan dengan kegagalan dalam rundingan di antara Plaintif Pertama dan Defendan Pertama untuk menyelesaikan perselisihan di antara mereka termasuk campurtangan oleh abang Defendan Pertaman pada Oktober/November 2002, Plaintif Pertama telah memberi satu notis bertarikh 19.11.2002 kepada Defendan Pertama dan Kedua meminta supaya mereka memulangkan saham amanah tersebut kepada Plaintif Pertama selaras dengan akujanji yang diberikan oleh mereka di bawah notis-notis yang bertarikh 23hb Ogos 2000.

5(a)(ii) Sesalinan notis bertarikh 19.11.2002 kepada Defendan Pertama dan Kedua juga telah disalinkan kepada setiausaha syarikat melalui Encik Peter Khoo Peng Lai pada atau kira- kira pada 22.11.2002, di mana setiausaha syarikat telah diarahkan oleh Plaintif Pertama untuk meminta Defendan Pertama dan Kedua memulangkan saham amanah tersebut kepada Plaintif Pertama. Plaintif akan merujuk kepada surat bertarikh 19.11.2002 tersebut semasa perbicaraan penuh nanti.

5(b) Kira-kira 2 atau 3 hari selepas notis bertarikh 19.11.2002 tersebut di atas telah diberi kepada Defendan Pertama dan Kedua, Defendan Pertama dan Kedua telah secara lisan memberitahu Pengaudit Akaun Syarikat, Encik Peter Khoo Peng Lai, bahawa Defendan Pertama dan Kedua tidak akan memulangkan atau memindahbalik saham amanah tersebut kepada Plaintif Pertama.

5(c) Pada 28.11.2002, peguamcara Plaintif Pertama, iaitu Tetuan C.K. Tan & Co, telah menghantar serah borang-borang pindahmilik saham-saham, resolusi-resolusi dan dokumen- dokumen syarikat-syarikat Defendan yang telah disediakan oleh Setiausaha Syarikat dan menyerah dokumen-dokumen tersebut kepada pejabat Defendan Pertama dan Kedua meminta Defendan Pertama dan Kedua supaya menyempumakan borang-borang pindahmilik dan dokumen- dokumen tersebut dalam tempoh 48 jam untuk memulangkan saham amanah tersebut kepada Plaintif Pertama.

Keengganan Defendan Pertama dan Kedua memulangkan saham amanah tersebut kepada Plaintif Pertama.

5(d) Akan tetapi, Defendan Pertama dan Kedua melalui surat peguamcaranya, Tetuan Azman Davidson & Co. yang bertarikh 29.11.2002 telah enggan untuk

mematuhi notis peguam Plaintif Pertama tersebut untuk memindahbalik saham amanah tersebut kepada Plaintif Pertama dan Defendan Pertama dan Kedua telah dengan tegas dan terang-terangan menafikan bahawa dia mereka ada memegang saham amanah tersebut untuk Plaintif Pertama. Plaintif Pertama akan merujuk kepada surat guaman Defendan Pertama dan Kedua yang bertarikh 29.11.2002 tersebut semasa perbicaraan nanti.

Kemungkiran akujanji/persetujuan Defendan Pertama dan Kedua secara terus terang memulangkan saham amanah tersebut kepada Plaintif Pertama adalah disengajakan dan dilaksanakan secara niatjahat dan bermotif peribadi.

6(a) Dalam premis seperti yang tersebut di perenggan 5(b) dan 5(d) di atas, Defendan Pertama dan Kedua telah secara salah dan niat jahat memungkiri amanah dan akujanji bertulis dan/atau peijanjian yang bertarikh 23.08.2000 tersebut dengan Plaintif Pertama untuk memulangkan atau memindahbalik saham amanah tersebut kepada Plaintif Pertama atas notis yang telah diberi oleh Plaintif Pertama.

6(b) Plaintif Pertama menyatakan bahawa kemungkiran atau keengganan Defendan Pertama dan Kedua untuk memulangkan atau memindahkan balik saham amanah tersebut kepada Plaintif Pertama walaupun di beri notis tuntutan adalah disengajakan dan dilaksanakan oleh Defendan Pertama dan Kedua secara mala fide, dengan niat jahat dan/atau secara frod, dan tujuan atau motif oleh Defendan Pertama dan Kedua, antara lain adalah seperti berikut:-

(i) Untuk melucutkan, menafikan dan!atau melarang Plaintif Pertama daripada menjadi ahli atau 'member' syarikat-syarikat Defendan dan seterusnya melarang Plaintif Pertama daripada menghadiri apa-apa mesyuarat EGM dan/atau AGM yang diadakan atau akan diadakan oleh Defendan Ketiga hingga Kelapan atas rekuisisi Defendan Pertama dan Kedua ekoran daripada terbongkamya frod yang dilakukan oleh Defendan Pertama di mana beliau telah mengeluarkan II secara salah cek SBB yang berjumlah RM206,600.00 pada Ogos 2002;

(ii) Untuk menafikan Plaintif Pertama daripada kepunyaan ('ownership') saham amanah tersebut, atau melarang Plaintif Pertama daripada menuntut Plaintif Pertama daripada menuntut kepunyaan saham amanah tersebut dan seterusnya menafikan hak-hak Plaintif Pertama untuk menikmati faedah atau dividen saham amanah tersebut;

(iii) Untuk menyingkirkan Plaintif Pertama sebagai pengarah syarikat-syarikat Defendan tersebut dan penandatangan bersama dan wajib kesemua akaun bank syarikat-syarikat Defendan, dan seterusnya melarang Plaintif Pertama daripada mengambil bahagian dalam pengurusan di dalam syarikat-syarikat tersebut;

(iv) Untuk melarang Plaintif Pertama daripada menyiasat dan mengetahui sebarang kesalahan atau penyelewengan yang telah dilakukan atau yang mungkin dilakukan oleh Defendan Pertama atau pihak lain terhadap syarikat-syarikat Defendan terutama terhadap Defendan Ketiga dan Defendan Ketujuh yang telah menjalankan pemiagaan memajukan hartanah;

(v) Untuk melarang Plaintif Pertama selaku pengarah daripada mendedahkan/membongkar kes penipuan cek terhadap syarikat Defendan ketiga yang dilaukan oleh Defendan Pertama tersebut yang melibatkan jumlah sebanyak kira-kira RM206,000.00 pada bulan Ogos 2002, di mana butir-butir penipuan atau frod oleh Defendan Pertama terhadap Defendan Ketiga adalah temyata di bawah sini dengan lebih terperinci (sila rujuk kepada perenggan 16 di bawah sini);

(vi) Untuk melarang Plaintif Pertama selaku pengarah daripada mempunyai akses dan meneliti akaun-akaun dan buku-buku syarikat-syarikat Defendan, dan Defendan Pertama sebenamya telah melarang Plaintif Pertama pada 25.11.2002 daripada meneliti buku-buku dan akaun-akaun syarikat-syarikat Defendan tersebut walaupun Plaintif Pertama adalah pengarah syarikat-syarikat Defendan sejak permulaan pemiagaan syarikat-syarikat Defendan tersebut pada tahun 1996/97; dan

(vii) Untuk memaksa, mengugut dan menekan Plaintif Pertama dan Kedua supaya menjual 25% saham mereka di dalam syarikat-syarikat Defendan tersebut kepada Defendan Pertama dengan harga yang rendah iaitu sebanyak RM500,000.00 seperti yang ditawarkan oleh Defendan Pertama di mana harga tersebut adalah tidak berpatutan atau tidak mengikut nilai harta ('NTA') syarikat-syarikat Defendan tersebut.

Butir-butir kemungkiran amanah dan akujanji Defendan Pertama dan Kedua untuk memulangkan saham amanah tersebut dan kesalahan 'conversion of trust shares' oleh Defend an Pertama dan Kedua.

35D(a) Satu deklarasi bahawa Defendan Pertama dan Kedua memegang 13% saham amanah tersebut di dalam syarikat Defendan Ketiga hingga Kelapan bagi Plaintif Pertama, dan/atau secara altematif, Defendan Pertama dan Kedua telah memungkiri akujanji mereka secara bertulis untuk memulangkan 13% saham amanah tersebut kepada Plaintif Pertama atas notis yang telah diberikan kepada mereka pada 19.11.2002 dan 28.11.2002.

(b) satu perintah bahawa Defendan Pertama dan Kedua dikehendaki menandatangani kesemua borang pindahmilik saham-saham tersebut dan resolusi yang disediakan oleh setiausaha syarikat Defendan-Defendan untuk memindahbalik atau memulangkan 13% saham amanah tersebut kepada Plaintif Pertama dalam masa tujuh (7) hari dari tarikh perintah Mahkamah ini diberikan, dan saham-saham yang kena dipindahmilik balik kepada Plaintif Pertama oleh Defendan Pertama dan Kedua adalah seperti berikut:-

Nama-nama Syarikat	Saham-saham yang kini dipegang oleh Defendan Pertama dan Kedua dan harus dipindahmilik kepada Plaintif Pertama
(i) Trend Intan Development Sdn Bhd	Ng Kong Lin, 13% atau 215,139 unit saham
(ii) Intan Cendekia Sdn Bhd	Lee Siew Hoon, 13% atau 5,200 unit saham
(iii) Amity Accord Sdn Bhd	Lee Siew Hoon, 13% atau 5,200 unit saham
(iv) Vibrant Portfolio Sdn Bhd	Lee Siew Hoon, 13% atau 5,200 unit saham
(v) Ardent Realty Sdn Bhd	Ng Kong Lin, 13% atau 5,200 unit saham

(vi) Yingyong Property Sdn Bhd Ng Kong Lin, 13% atau 65,000 unit saham

(c) Jika Mahkamah ini memberi perintah seperti yang dipohon di perenggan D(b) di atas dan Defendan Pertama dan Defendan Kedua enggan menandatangani borang-borang pindahmilik saham-saham tersebut kepada Plaintif Pertama atau nomineenya dalam masa yang ditetapkan, Timbalan Pendaftar Mahkamah Tinggi diberi kuasa untuk menandatangani borang-borang pindahmilik 13% saham-saham amanah tersebut dan resolusi berkenaan bagi pihak Defendan Pertama dan Defendan Kedua, dan setiausaha syarikat diarahkan dan dikuasakan untuk mendaftarkan 13% saham-saham amanah tersebut dalam buku pendaftaran saham dan Defendan Ketiga hingga Kelapan dan memfailkan 'any returns' dengan Suruhanjaya Syarikat Malaysia atas nama Plaintif Pertama atau nomineenya dan segala kos perbelanjaan berkenaan dengan pindahmilik tersebut ditanggung oleh Defendan Pertama dan Kedua;

[16] It was the contention of the appellants that in those paragraphs the first respondent asserted the very case he had asserted as a defence in the sessions court action, namely:

(a) that he had transferred 13% of the shares in each of the third and eighth respondent companies to the appellants concerned; and

(b) that the transfers were based on the alleged written undertakings given by the appellants on 23 August 2000 to hold these shares in trust for him and to transfer them back to him upon his demand.

[17] However, on 18 June 2013, the Shah Alam High Court dismissed the appellants' striking out application. The appellants' appeal to the Court of Appeal was also dismissed.

ISSUES AND FINDINGS

[18] As stated earlier, this court had granted leave to appeal to the appellants on three questions of law. Question 1 and question 2 are inter-related.

[19] Question 1 posed the question of whether the sessions court was a court of competent jurisdiction to decide on the trust issue. Question 2 posed the question of whether s 66 can be read as an exception to s 69 to enable the disposal of the whole matter in controversy between the parties and to prevent truncated trials or the staying of proceedings in the sessions court pending referral of the matter to the High Court.

[20] Thus, the issue before us based on the two questions is whether the sessions court is precluded altogether under the Subordinate Courts Act 1948 ('the Act') from deciding any question relating to a trust. The relevant sections

of the Act relating to this issue are ss 66 and 69 which read:

> 66 Counterclaims in Sessions Court and transfer therefrom:
>
> (1) Where in any action or suit of a civil nature before a Sessions Court any defence or counterclaim of the defendant involves matters beyond the jurisdiction of the Court, the defence or matter shall not affect the competence or the duty of the Sessions Court to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff and any defence thereto, but no relief exceeding that which the Court has jurisdiction to award shall be given to the defendant upon the counterclaim.
>
> (2) In any such case the High Court may, if it thinks fit, on the application of any party, order that the action or suit be transferred to the High Court, and the action or suit shall then be entered in the cause book or register of civil suits of the High Court, and proceeded with as if the action or suit had been originally instituted therein.
>
> 69 Exceptions to jurisdiction.
>
> Sessions Court shall have no jurisdiction in actions, suits or proceedings of a *civil nature* —
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (e) to enforce trusts;

[21] Learned counsel for the appellants submitted that s 69(e) of the Act did apply to the facts of this case. Learned counsel referred to the case of *Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822 where the Court of Appeal had considered the meaning of the words 'to enforce trusts' in s 69(e) of the Act. The Court of Appeal held:

> [7] ... the words 'enforce trusts' in s 69(e) refer to an action by a beneficiary or beneficiaries as the case may be to compel trustees to perform the terms of the particular trust or settlement or to direct them to refrain from doing anything that is inconsistent with the terms of a trust ... It may have to do with the sale of trust property or the payment out of income from a capital asset to beneficiaries. But what those words certainly do not refer to is an action by the true owner to recover monies wrongly appropriated by a person whom equity holds accountable ... Accordingly, the sessions court had jurisdiction over the subject matter of the appellant's claim.

[22] In short, reading s 69(e) of the Act, *Koh Siew Keng* presupposes the existence of a trust in which identifiable terms may be 'enforced' by the parties to the trust.

[23] The first and second respondents submitted before us, that the jurisdiction in respect of 'to enforce trusts' is reserved for the High Court by virtue of s 69(e) of the Act. Hence, the sessions court has no jurisdiction to determine an 'enforcement of trust' claim. The sessions court is not competent to adjudicate disputes relating to a trust. In other words, it was the contention of the first and second respondents that the trust issue had not been adjudicated by a court of competent jurisdiction, and as such the first and second respondents are free to litigate the trust issue again before the High Court.

[24] It was further submitted that the sessions court was not asked to and did not make any order, declaration or direction on the trust issue. To this, learned counsel referred to us the relevant passages in the grounds of judgment which were translated into English, and read:

> 4. On the defendant's claim that the monies can be set off against dividend and profit of the company, because the defendant is one of its shareholders, on the balance of probability the court found that the plaintiff's version of evidence is more probable, that is, that there was no oral agreement and that the monies was a loan that must be repaid by the defendant. The grounds of this court decision are as follows:
>
> (a) the defendant claimed that the defendant is one of the shareholders premised upon the 13% shares purportedly owned by the defendant but was held on trust by SP1; however P27, that is, the company commission's search, clearly shows that the defendant is not one of the registered shareholder of the plaintiff's company, and further, Article 9 of the memorandum and article of association (P1) clearly states that no one is recognised by the plaintiff for holding its share on trust. Although the defendant brought SD2 in support of his version of evidence, and the defendant and SD1 both gave evidence that the defendant's share was held on trust by SP1 premised upon one 'gentleman's agreement' between the defendant and SP1 that took place in front of SD2, court however found that the evidence of the defendant and SD2 contradict the documentary evidence of P1 and P27.
>
> (c) The defendant attempted to produce some documents, that is, IDD22 and IDD23 to show that the 13% share was transferred to SP1 on condition it must be returned to the defendant upon demand; the plaintiff disputed the authenticity and the contents of both documents and demanded for the production of the original copy of IDD22 and IDD23 by the defendant; the defendant however failed to do so. The defendant initially claimed he can bring the original copy; however on 13 December 2010, the defendant's counsel submitted that the original copy of IDD22 and IDD23 was lost and tried to produce a police report made on 25 August 2007; because the police report was produced at the last minute it was not admitted by the court and was returned to the defendant's counsel. IDD22 and IDD23 are critical documents to the defendants; the defendants should be ready with those documents and not giving inconsistent excuses in court; on 11 November 2010 the defendant informed the court that he can bring the original copy on the next date, however on 13 December 2010 he informed the court that those documents were missing

and attempted to produce a police report which does not specifically refer to IDD22 and IDD23. Therefore, this court could not admit IDD22 and IDD23. Furthermore, IDD22 and IDD23 are contradictory of one another, where at the 'b.c.c.' part of the documents, the word 'with or' was crossed on IDD23 but not on IDD22; both IDD22 and IDD23 brought two very different meanings, and rendered both IDD22 and IDD23 very confusing and questionable. Thus, court admitted P21 document and found on the balance of probabilities, that the SP1 version of evidence that the 13% share was transferred by the defendant to SP1 without condition is more probable.

[25] It was submitted by learned counsel for the first and second respondent that the above passages could not provide a basis for a res judicata argument on a trust claim in a subsequent litigation.

[26] It was further argued that the first appellant could not rely on the doctrine of res judicata in subsequent litigation as he was neither a party nor privy in the Shah Alam Sessions Court action.

[27] Finally, learned counsel relied on the case of *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 ALL ER 536, where the House of Lords stated that estoppel must never become the instrument of injustice, and it shall not be applied if it does not promote justice between the parties. This principle, according to learned counsel was applied by the Court of Appeal in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 where Gopal Sri Ram JCA (as he then was) held:

Being a land office title, the application for foreclosure should have been made to the land administrator. Section 260(2) of the Code requires that to be done in mandatory terms. The section is jurisdictional. In other words the High Court had no jurisdiction over the matter.

First, that although the High Court has unlimited jurisdiction, it nevertheless has no jurisdiction to make an order in breach of the express provisions of a statute (in that case, the Malay Reservation Enactment) or of the Federal Constitution.

If reinforcement is required to support the proposition that neither consent nor estoppel nor waiver can confer jurisdiction upon a court that Jacks jurisdiction, it may be found in the speech of Lord Reid in *Essex County Council v Essex Incorporated Congregational Church Union* [1963] 1 All ER 326 at p 330. The learned Law Lord addressed the point as follows:

[1] In my judgment it is a fundamental principle that no consent can confer on a court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.

Now, there is a dimension to the doctrine or res judicata that is not always appreciated. It is this. Since the doctrine (whether in its narrow or broader sense) is

designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.

Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2) [1966] 2 All ER 536 at p 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case [1938] 4 ALL ER 747 at p 755; [1939] AC at p 21)). All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.

In *Arnold v National Westminister Bank Plc* [1991] 2 AC 93 at p 109, Lord Keith of Kinkel expressed the following view:

> In my opinion Your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result, as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 ALL ER 536 at p 373, [1967] 1 AC 853 at p 947.

Adopting the approach that commends itself to me, I find that the justice of the present instance demands that the decision in *Scotch Leasing (No 1)* ought not, in the interests of justice, to bar the appellants from re-agitating the issue of the jurisdiction of the High Court to make the order for sale in the initial foreclosure proceedings.

If the High Court lacked jurisdiction at the time it made the order for sale, it continued to lack the jurisdiction despite the views expressed by Peh Swee Chin SCJ. As such, it would be an affront to justice to permit the respondent to successfully plead res judicata in the second suit as that would tantamount to applying the editorial blue pencil across the mandatory provisions of s 260(2) of the Code.

[28] Thus, the question is whether the decision of the sessions court in the present case was made in excess of jurisdiction or made without jurisdiction at all. There is no dispute that s 69(e) of the Act clearly states that the sessions court shall have no jurisdiction in actions, suits or proceedings of a civil nature to enforce trusts.

However, we agree with the submission of learned counsel for the appellants that s 69 should not be read in isolation. It must be read together with s 66 which is an exception to s 69 to enable disposal of the whole of the matter in controversy between the parties and to prevent truncated trials or the staying of proceedings in the sessions court pending referral of the matter to the High Court.

[29] As rightly pointed out by learned counsel for the appellants, s 69(e) of the Act does not really apply to the facts of this case. The words 'to enforce trusts' was discussed in the case of *Koh Siew Keng*, where the Court of Appeal held:

> [7] ... the words 'enforce trusts' in s 69(e) refer to an action by a beneficiary or beneficiaries ... to compel trustees to perform the terms of the particular trust or settlement or to direct them to refrain from doing anything that it is inconsistent with the terms of a trust ... It may have to do with the sale of trust property or the payment out of income from a capital asset to beneficiaries. But what those words certainly do not refer to is an action by the true owner to recover monies wrongly appropriated by a person whom equity holds accountable ... Accordingly, the sessions court had jurisdiction over the subject matter of the appellant's claim.

[30] However, in our present case the issue was not 'to enforce trust'.The trust issue was raised merely as a defence by the first respondent in the sessions court to claim a set off against the debt owing by him to Trend lntan Development Sdn Bhd. The first respondent required the sessions court to make a finding that the shares were held in trust for him so that the dividends from the share could be set off against the debt he owed to Trend lntan Development Sdn Bhd. Therefore, we are of the view that s 69(e) did not apply in this case because it was not an action brought to enforce a trust but a defence to determine the existence of a trust to claim the set off. Enforcing a trust and determining the existence of a trust are two different matters, and are distinguishable.

[31] The objective of s 66 is very clear. The objective is to prevent defendants from delaying the action. It allows the sessions court to proceed with the defence of a counterclaim which exceeds its jurisdiction provided that any award made in respect of the counterclaim at the end of the trial does not exceed its monetary limit of jurisdiction. In *Wong Kon Sang v Chang Litho Press Ltd* [1968] 2 MLJ 234, Ismail Khan J (as he then was) in interpreting s 66(1) of the Court Ordinance 1948, which is in pari materia with the present section, held as follows:

> Under this subsection, even if the counterclaim involves matters beyond the jurisdiction of the court it could still dispose of the whole matter in controversy so far as it relates to the demand of the plaintiff and any defence thereto. The only

A qualification is that it has no jurisdiction to award a relief in excess of that which it has jurisdiction to award.

[32] We are of the same view. Section 66(1) of the Act clearly provides that where any defence or counterclaim of the defendant in an action before the B sessions court involves matters beyond the jurisdiction of the court, such defence or counterclaim should not affect the competence of the sessions court to dispose of the whole matter between the parties. In short, it would not be a bar to the sessions court jurisdiction on the whole matter in controversy.

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[33] The words 'the whole matter in controversy' promulagated in s 66(1) of the Act would ordinarily mean all the matters in dispute between the parties. Lord Sumner in the Privy Council case of *Ahmad Salaji v Hashim Salaji* [1915] 42 1A 91 observed:

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> ... the expression 'matters in controversy' cannot ... exclude matters ... which must have been naturally decided if any question had arisen and were the foundation of the whole determination.

E **[34]** We are of the view that s 66(1) of the Act is made wider in its meaning than the case of *Ahmad Salaji v Hashim Salaji* by the use of the words 'the whole matter in controversy'. Thus, it is our view that the legislative purpose behind s 66(1) of the Act is that if a matter raised by way of defence or counterclaim by a defendant is a 'matter beyond the jurisdiction' of the sessions F court, it shall have 'the competence and duty' to dispose of 'the whole matter in controversy' between the parties. It follows that s 66 is an exception to the limitations contained in s 69 of the Act.

[35] Accordingly we answer question 1 in the negative and question 2 in the G affirmative.

[36] The next question is whether the trust allegation (whether the 13% of the shares in the respondent companies were held in trust for the plaintiff/first respondent and second respondent by the appellants) was an estoppel issue or H had become res judicata by reason of the decision of the sessions court that was upheld by the High Court.

[37] In *Asia Commercial Finance (M) Sdn Bhd v Kawai Teliti Sdn Bhd* [1995] 3 MLJ 189 the Supreme Court had held that when a matter between I two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more over the same matter because the judgment 'becomes the truth between the parties'. Where a matter has been adjudged, the Supreme Court held that an *estoppel per rem judicatum* arose to prevent a party from relitigating the cause or issue. The

Supreme Court held as follows:

> ... issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded above; the corollary being that neither of such parties will be allowed to adduce evidence or adduce any argument to contradict such decision.

[38] Thus, the issue of estoppel could be raised whether or not the cause of action in the first proceeding is by nature the same as the second proceedings. Diplock LJ in *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 explained:

> It operates in subsequent suits between the same parties in which the same issue arises. A fortiori it operates in any subsequent proceedings in the same suit in which the issue has been determined.

[39] As rightly submitted by learned counsel for the appellants, this rule extends to cover a person who is in privity with the parties, a 'privy' as he is called, who is bound equally with the parties, in which case he is estopped by res judicata. The other exception is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct. This conduct sometimes consists of active participation in the previous proceedings (see *Nana Ofori Atta II, Omanhene of Akyem Abuakwa v Nana Abu Bonsra II as Adansehene and as Representing Stool of Adanse* [1958] AC 95 followed by *Re Thien Kon Thai* [2008] 6 MLJ 278).

[40] The established position relating to issue of estoppel is that neither the same parties nor their privies in subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment (see *North West Water Ltd v Binnia & Partners (a firm)* [1990] 3 All ER 547 followed in *Wong Peng Yan Benjamin v Genting Bhd & Anor* [1993] 3 MLJ 713 and *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122).

[41] Applying the settled principle of law as discussed above, to the facts of this case, we are of the view that the first respondent is precluded from challenging the correctness of the earlier decision of the High Court. Although the appellants were not directly parties in the sessions court action brought by the third respondent against the first respondent, the first respondent was however a party to the session court action and the High Court action. And it was the first respondent who chose to raise the issue of 13% shares as a defence.

[42] Since it was the first respondent who had raised the trust issue as his defence in the sessions court action, the rejection of the defence must necessarily be a part of the ratio decidendi of the case and not an obiter dicta as held by the Court of Appeal. This is particularly so, when many days were spent hearing the issue relating to the alleged trust. Four witnesses were called at the sessions court trial, which lasted nine days. The first appellant and first respondent, as witnesses, were cross examined extensively on the alleged trust and the session court. The first respondent called one Dato' Khoo Peng Lai, the then company auditor of the third respondent company, to testify in support of the alleged trust over the shares. The first respondent also called one Jessica Yeong Pew Wan, a legal secretary with the law firm of Messrs Abraham Ooi & Partners to testify on his behalf in relation to the alleged trust. In response, the first appellant testified in the sessions court disputing the existence of any alleged trust.

[43] From the records, it is clear that the witnesses called by the respective parties were subjected to extensive cross-examination in relation to the issue of the alleged trust over the shares. The parties also adduced documentary evidence in the sessions court in support of their respective case as to the existence or otherwise of the alleged trust. Ultimately, upon conclusion of the full trial, the sessions court found against the first respondent in relation to his defence based on the alleged trust and rejecting the first respondent's claim.

[44] Thus, we are of the view that the findings of the sessions court in relation to the trust issue were not a mere observation, remark or obiter dicta. The trust issue was decided upon by the session court and affirmed by the High Court. Hence, the first respondent is estopped from litigating it again in the Shah Alam High Court proceeding. The principle of res judicata applies to the present case.

[45] Accordingly, we answer question 3 in the affirmative. Therefore the appeal is allowed with costs. The paragraphs in the first respondent's re-amended statement of claim in the Shah Alam High Court action relating to the trust issue are struck out.

Appeal allowed.

Reported by Ashok Kumar